Cimpi Transportation Company *and* **Robert R. Reger.** Case 3-CA-9797

7 July 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 9 February 1983 Administrative Law Judge James L. Rose issued the attached Supplemental Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Cimpi Transportation Company, Syracuse, New York, its officers, agents, successors, and assigns, shall pay Robert R. Reger the sums of $23,996.15 and $2,728.40 as set forth in the attached Appendix with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977), less tax withholdings required by Federal and state laws.

APPENDIX

Backpay of Robert R. Reger

Yr/Qtr	*Gross Backpay*	*Gross Interim Earnings*	*Allowable Expenses*	*Net Interim Earnings*	*Net Backpay*	*Hrs (at 40/week)*	*Fringe Benefit Contributions*
1980 2	$2,324.00	0	0	0	$2,324.00	240	$180.00
1980 3	5,036.20	0	0	0	5,036.20	520	390.00
1980 4	5,244.80	2m642.23	581.50	2,060.73	3,184.07	560	420.00
1981 1	4,648.80	5,922.24	1,091.35	4,830.89	0	480	360.00
1981 2	5,036.20	17,093.78	14,183.01	2,910.77	2,125.43	520	390.00
1981 3	5,036.20	8,569.96	6,094,42	1,475.54	3,560.65	520	390.00
1981 4	5,887.56	0	0	0	5,887.56	520	457.60
1982 1	1,878.24	0	0	0	1,878.24	160	140.80
					$23,996.15 plus interest		$2,728.40 plus interest

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was heard before me at Buffalo, New York, on December 16, 1982, upon the General Counsel's backpay specification alleging that a certain sum of money is

[1] We find it unnecessary to pass on the Administrative Law Judge's statement that becoming an owner-operator "is not really self-employment."

Chairman Dotson would find that in certain cases self-employment may constitute a willful loss of earnings that a respondent should not be required to subsidize. See *McCann Steel Co. v. NLRB*, 570 F.2d 652 (6th Cir. 1978). Chairman Dotson, however, in agreement with the Administrative Law Judge, finds that under all the circumstances presented in the instant case, Reger's change of employment from Hartley Trucking, Inc., to Midwest Emery-Safeway Truck Lines did not constitute a willful loss of earnings.

[2] The General Counsel has excepted to the Administrative Law Judge's failure to include in his recommended Order reimbursement by Respondent to Reger of fringe benefit contributions plus interest which would have been remitted to Reger during the backpay period. We find merit in this exception.

At the hearing the parties entered into a written stipulation, providing in pertinent part:

4. Respondent is required to reimburse Reger the contribution that would have been remitted to him pursuant to the terms of the Service Contract Act. The amounts owing being determined by multiplying the number of hours Reger would have worked each quarter during his backpay period, at a maximum of 40 hours per week, by the applicable fringe benefit contribution rates, which are as follows:

May 18, 1980—October 5, 1981 $.75 per hour

October 6, 1981—January 25, 1982 $.88 per hour

Further, at the hearing Respondent did not contend or offer any evidence to establish that the General Counsel had included as offsets to gross interim earnings any expenses incurred by Reger for medical and dental insurance. Under these circumstances, we shall modify the Administrative Law Judge's recommended Order to include reimbursement for fringe benefit contributions as set forth in the attached Appendix.

The General Counsel has also excepted to certain inadvertent mathematical errors made by the Administrative Law Judge in his computation. We have corrected the errors in the attached Appendix.

owed to Robert R. Reger as result of Respondent's unlawful discharge of him.[1]

The parties stipulated to the backpay period, the amount of gross backpay ($35,092), and certain other items which had been at issue leaving unresolved whether certain items of expenses incurred by Reger during his interim employment should be set off from interim earnings and whether he suffered a willful loss of earnings.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. THE MATERIAL FACTS

As an employee for Respondent, Reger was an over-the-road truckdriver principally engaged in hauling materials from the Buffalo area to Chicago and back. During the course of his employment with Respondent, Reger was not compensated for such meals as he ate while he was away from home nor was he compensated for any expenses he incurred for motel rooms. (Such expenses were rare because he was assigned a tractor with a bunk.)

The principal dispute concerns expenses incurred by Reger in connection with employment he had with Hartley Trucking, Inc. of Carey, Ohio, in the fourth quarter of 1980 through the second quarter of 1981, and for Midwest Emery-Safeway Truck Lines during the second and third quarters of 1981. Also Respondent contends that Reger's employment with Midwest constituted a willful loss of earnings. Specifically, Reger claims for setoff from interim earnings meal and motel expenses and travel costs from his home to Carey. Respondent contends that these are not allowable items to be set off from interim earnings.

II. ANALYSIS AND CONCLUDING FINDINGS

An employee who has been discriminatorily discharged is entitled to recover any lost wages or other rights and benefits suffered as a result. He is, however, obligated to mitigate these damages by seeking interim employment, but is entitled to have set off from any interim earnings such reasonable expenses he may have incurred in obtaining and maintaining that employment. Thus such expenses as transportation, room, and board incurred in connection with having to take a job away from the locality of Respondent's place of business are deductible from interim earnings. E.g., *Aircraft & Helicopter Leasing*, 227 NLRB 644 (1976). It follows, however, that job-related expenses which would have been incurred and not reimbursed had Reger continued to work for Respondent are not deductible.

There is no issue concerning the reasonableness of Reger's employment with Hartley. Indeed, the job was substantially the same as that he had with Respondent. Nor is there any question that it was unreasonable for him to seek and obtain work outside the Buffalo area. Thus, I conclude that such expenses as Reger incurred as a result of his employment with Hartley which were unique to that employment *vis-a-vis* employment with Respondent should be set off from his interim earnings from that company.

Transportation to and from Carey and any living expenses incurred by Reger while he was in Carey waiting to be assigned a trip should reasonably be set off against his interim earnings. But those expenses he had when he was actually on the road and which were not expenses reimbursed by Respondent should not be set off. Reger testified that Respondent did not reimburse him for meals and lodging. And he testified that Hartley assigned him a tractor with a bunk.

Reger's room and board expenses while in Carey should be set off whereas the meals and lodging expenses that he had while on the road should not.

Reger submitted a weekly compilation of expenses which included meals, motel, travel, showers, and telephone calls each week while employed for Hartley. These items were totaled and deducted from gross backpay. This itemization does not distinguish between meals and motel expenses while away from Carey and those incurred while Reger was waiting in Carey for an assignment. However, this compilation along with Reger's testimony suggest that any motel expenses in those weeks when he also claimed travel expenses to and from his home was away from Carey (except the first 2 weeks when he had three nights in Carey going to school). And it appears that Reger claimed all meals taken away from his home at an average of $10 to $12 per day.

Thus I conclude that for those weeks in which Reger claimed transportation, the motel and meal expenses should not be allowed as a setoff. Where no travel is claimed, then motel expenses (usually for 2 days) plus meals (at the daily average of $11) should be allowed.[2] While this adjustment to the backpay formula may not be perfect, it seems reasonable given the record here, and reasonableness, not exactitude, is the test. *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966).

Respondent argues also that telephone expenses should not be allowed because such were not reimbursed when Reger worked for Respondent. Such expenses were reasonably necessary so that Reger would know what work was available. There is no showing that he incurred telephone expenses while working for Respondent or, if he did, that such were not reimbursed. Telephone expenses will be allowed as a setoff.

Respondent also contends that $110 of a total $610 in repayment of a $500 loan should be disallowed. Respondent does not contest allowing the $500, because, presumably, such is counted as earnings in November and December 1980. Since there is no basis to conclude that the additional payment of $110 is reasonable, or even what it was for, I conclude this amount should be disallowed.

As to Midwest, Respondent argues that motel, meal, and telephone expenses incurred while Reger worked as a lease driver should be disallowed. Since meals and motels were not reimbursed by Respondent and since

[1] *Cimpi Transportation Co.*, 256 NLRB 1064 (1981).

[2] For instance, in the fourth quarter of 1980 motel expenses of $54 (3 x 18) plus meal expenses of $33 (3 x 11) will be allowed as a setoff. The remaining motel and meal expenses for that quarter ($308) will not.

there is no showing that any of these items claimed were in connection with obtaining and maintaining employment, I must conclude that they should be disallowed. Telephone expenses will be allowed.

Other items of expenses, which Respondent contends are "questionable," appear reasonable. There is nothing in the record which would justify their exclusion. Hence all but those expenses noted above will be allowed.

Further Respondent contends that when Reger left the employment of Hartley and became a lease driver for Midwest his loss in net earnings amounted to a willful loss which Respondent should not be required to subsidize, citing, *McCann Steel Co. v. NLRB*, 570 F.2d 652 (6th Cir. 1978). There the circuit court rejected a holding that self-employment is interim employment even if the income is less than that which could have been earned as the abandoned job. The Board accepted the remand as the law of that case, *McCann Steel Co.*, 224 NLRB 607 (1976), but has not overruled its basic holding that one who goes into business for himself is treated as having taken interim employment. *Mastro Plastics Corp.*, 136 NLRB 1342 (1962), enfd. 354 F.2d 170 (2d Cir. 1965).

In any event, the facts here are much different from in *McCann*. Reger reasonably believed that Hartley was going out of business and in fact Hartley filed bankruptcy in November 1981. Further, while Reger became an owner-operator such is not really self-employment. He worked principally for one company doing the same work he had done for Hartley, and for Respondent. Only the method of pay and who was responsible for which expenses were changed.

For Reger to leave Hartley under these circumstances did not amount to a willful loss of earnings. Hindsight suggests that he might have done better had he stayed with Hartley a few more months, but to make the change when he did does not seem unreasonable. An employee's efforts to mitigate backpay liability are required only to be reasonable—"not the highest standard of diligence." *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420, 423 (1st Cir. 1968).

Finally, given Reger's testimony that he made a mistake by including expenses after he started to work for Midwest in mid-April 1981, those claimed expenses will be deducted from interim earnings with Hartley.

Thus I conclude that the claimed expenses should be reduced as follows:

Quarter	*Claimed Expenses*	*Nondeductable*	*Allowable Expenses*
1980/4	$889.50	$ 308.00	$581.50
1981/1	1,939.35	848.00	1,082.35
1981/2	15,671.42	1,488.41	14,203.01
1981/3	7,641.27	546.85	7,094.42
		$3,191.26	

Net backpay as shown on General Counsel's Exhibit 3 should therefore be reduced by $3,191.26.

Upon the foregoing findings of fact and conclusions of law, the entire record in this matter, and pursuant to Section 10(c) of the Act, I issue the following recommended:

SUPPLEMENTAL ORDER[3]

The Respondent, Cimpi Transportation Company, Syracuse, New York, its officers, successors, and assigns, shall pay to Robert R. Reger the sum of $23,814.07 with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.